Petition

No. 81-699

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM H. ADDINGTON,

Appellant

v.

FARMER'S ELEVATOR MUTUAL INSURANCE COMPANY, A Corporation,

Appellee

PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM H. ADDINGTON, Pro se
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(817) 284-2698

Question Presented

Should the United States Court of Appeals for the Fifth Circuit have directed the District Court to allow a trial due to the fact the appellant was denied a jury trial in the original district court.

Should the United States Court of Appeals for the Fifth Circuit have directed the District Court to allow a trial due to the fact the appellant should have been allowed to amend the complaint when justice is apparent.

When the action has not been placed on the trial calender the Fifth Circuit Court should have allowed appellant a trial and ordered the District Court it should have allowed appellant to amend complaint. The party named in Appellant's Petition for Writ of Certiori is Farmer's Elevator Mutual Insurance Company, A Corporation.

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IN THE SUPREME COURT OF THE UNITED STATES

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Opinions Below

The District Court and the Circuit Court of Appeals for the Fifth Circuit both denied motion to amend complaint.

Jurisdiction

The judgement of the Court of Appeals below (Appendix , infra p.25) was

entered on July 13,1981. Reconsideration was not sought. Jurisdiction of the United States District Court in Appellants Petition was involked under 28 U.S.C. 1332. The jurisdiction of this Court is involked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

UNITED STATES CONSTITUTION ARTICLE V11.
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
RULE 60,Federal Rules of Civil Procedure.
(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.
(2) newly discovered evidence which by due diligence could not have been discovered

in time to move for a new trial under rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgement is void; (6) (b) does not effect the finality of a judgement or suspend its operation. This rule does not limit the power of a court to entertain an independant action to relieve a party from a judgement, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28. U.S.C.-1655 or to set aside a judgement for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgement shall be by motion as prescribed in these rules or by an independant action.

As amended Dec. 27,1946,eff. March 19,

1948; Dec.29,1948, eff. Oct. 20,1949.

Rule 15 of the Federal Rules of Civil Procedure.

(a) Amendments. A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calender, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Statement of the Case

William H. Addington was president and sole stockholder of a Kansas corporation known as Addington Grain Co. Inc. This corporation owned and operated a seven and one half million bushel grain elevator located in Hutchinson, Kansas. This elevator was licensed by the Kansas Warehouse Department. In the fall of 1965 this elevator was measured short of Commodity Credit Corporation grain. The Commodity Credit Corporation is an agency of the federal government. Until this time the appellant in this case had no idea that his employees, officials of the Commodity Credit Corporation, and many others had formed a conspiracy to embezzle approximately eight million dollars from him. These employees falsified income tax returns, falsified inventory records etc. When the shortage was discovered in the fall of 1965, the Kansas State Warehouse Department started an investigation. They reported that

the grain was at the elevator on May 13, 1965, the last measure up prior to the shortage. The Kansas Warehouse Department then started an investigation to determine what happened to the grain. A deposition of the leader of the team to investigate the missing grain testified that the Commodity Credit Officials informed him that he or his team was not to bother with this investigation, that they would handle it. Therefore he testified he had nothing to do with investigating the missing grain even though the agency was the one who had control of the facility and not the Commodity Credit Corporation. The Commodity Credit Corporation sent two investigators to investigate the missing grain. These two investigators took the Santa Fe Railroad records from the depot agent in Hutchinson, Kansas which would show what happened to the grain. Addington attempted for sixteen years to get these records but the Commodity Credit Investigators refused

these records. Then in different trials these two Commodity Credit Investigators testified the grain was missing from this grain facility for several years prior to the measured shortage in the fall of 1965. The Kansas Warehouse Department officials testified the grain was there all the years including the measured amount in May of 1965. The Kansas Warehouse Department was the agency that licensed and bonded the facility not the Commodity Credit Corporation. The Commodity Credit Corporation only stored government grain in the facility along with other grain companies. The manager of Addington Grain Co. Inc. pleaded guilty to stealing this grain and falsifying records to the Commodity Credit Corporation. The original case was in the United States District Court of Kansas. The judge in this case was an enemy of the appellant in this case. When I say enemy, I mean a political enemy. The appellant attempted to get the judge off the

case and the judge refused. In a prior criminal case against the appellant this same judge refused to get off the case after repeated efforts by the appellant. The judge appointed a crook to represent the appellant, and the appellant ask the judge to replace the attorney and he refused. This appointed attorney tried to see to it that all the records were concealed from the appellant. This attorney told the appellant he would not represent him unless he pleaded guilty when he was in fact innocent. When the case came to trial the appellant told the attorney he would handle his own case and the attorney was to ask him certain questions on the witness stand etc. This attorney refused to call witnesses that would prove that the appellant was not guilty. Even with the crooks testifying, the jury believed the appellant and acquitted him. The two Commodity Credit Corporation Investigators told the jury the appellant was guilty and

had concealed the facts for years. The manager of the facility testified that the appellant was guilty. This same man pleaded guilty several years later in another criminal trial that he in effect stole this grain and falsified Commodity Credit records. This shortage of grain happened in the fall of 1965. In 1967 the Appellee in this case filed a suit against the Commodity Credit Corporation, Transamerica Corporation, William H. Addington and the Addington Grain Co. Inc. In this suit they contended there was a shortage of grain in the amount of about $650,000.00. They admitted they would be required to pay this amount to the Commodity Credit Corporation due to having a bond with the Commodity Credit Corporation stating they would pay any loss up to two million dollars from any one grain operator, and then they would be required to collect their money from the bonding companies of these

grain companies or the grain companies themselves. For bonding the entire United States grain companies this company received a fee of about thirty million dollars. The Commodity Credit Corporation wanted the Appellee in this case to pay One million three hundred thousand dollars to it. They contended there was $650,000.00 worth of missing grain plus $650,000.00 that had been paid to this corporation for storing grain that had been missing for several years. The only people who testified that the grain was missing for years was the manager of the facility who pleaded guilty of stealing this grain, and his employees under him, and the two Commodity Credit Corporation Investigators who stole the railroad records to cover up the truth. The Appellee in this case used the manager of this facility to testify that the Appellant was guilty in the trial in 1974.

The Appellee knew very well that this manager of this facility pleaded guilty of stealing this grain in a criminal trial in 1970 and served time at the Federal Pen at Leavenworth, Kansas. They also used the two Commodity Credit Investigators who stole the Santa Fe Railroad records to defraud the Appellant. The judge in this case used the testimony of these three people to make a decision that a judgement should be issued against the appellant. This judge let this case run from 1967 until 1974. It was understood by the appellant that the case was set for trial twenty seven times and postponed. Many times during these proceedures the appellant asked for a jury trial and each and every time the judge refused a jury trial. The judge in effect said it didn't make any difference who stole the grain, the appellant was responsible and should pay the loss. There was no question about the missing grain. The appellant's bond-

ing company, Transamerica, paid the grain loss to the Appellee. They informed the Appellee they would not pay the amount of $650,000.00 for grain storage payments paid for the missing grain when the agency that licensed and bonded the facility testified the facility was never short grain prior to the fall of 1965. The Appellee claims they settled with the bonding company for $650,000.00 and made a settlement with the Commodity Credit Corporation for about three hundred thousand dollars. Therefore they wanted the Appellant to pay them $330,000.00 that they claim they were obligated to pay the Commodity Credit Corporation. They settle with these people without any knowledge of the Appellant. They state in their suit that there was no missing grain prior to May 13,1965, and yet they agree to settle with the Commodity Credit Corporation without a trial. It is very obvious that the Appellee can make all kinds of concessions with the Comm-

odity Credit Corporation, when the Commodity Credit Corporation pays the Appellee thirty million dollars a year as a bonding fee. Obviously the Commodity Credit Corporation does not want this to go to trial when it would expose their partic-apation in the fraud. The appellant in this case was bankrupt because of the fraud against him. The Appellee uses the same judge in Kansas to have the Appellant hauled back to court in Kansas at his own expense at different times to be questioned under oath abouthis finances. The Appellee and the judge both are very aware the Appellant will never be able to get back into business with this fraudulent judgement against him. The Appellant filed a "MEMORIAL" for impeachment against this judge and he promptly retires, but he still is authorized to handle cases, obviously he is immune to impeachment since he is not full time. Appellant filed an independent action against the Appellee in the United

States District Court for the Northern District of Texas. This judge allowed new evidence be admitted when the Appellant won a jury decision in Amarillo, Texas for eight million dollars against eight former employees including the former manager of the Addington Grain Co. Inc. for embezzlement against him by these employees. The appellant was startled when this judge did not allow this case to go to trial. He was also startled when the Fifth Circuit Court of Appeals denied him his right to go to trial. The Fifth Circuit Court of Appeals didn't mention in their decision the most important point in this case. That point is the fact the Appellant was refused a jury trial time after time over a period of seven years. If any federal judge can refuse a citizen of a jury trial time after time, we have certainly lost our freedom in this country.

Appellant's Argument in Support of This Petition

In the District Court in Kansas where the original judgement was issued the judge denied this appellants civil rights. He refused time after time over a period of seven years to allow a jury trial when this appellant demanded a jury trial. This judge stalled this case for seven years and it was set for trial twenty seven times and postponed. This judge allowed the testimony of the manager of the facility who had pleaded guilty four years prior to this case of stealing this grain and falsifying the Commodity Credit Corporation records. He denied under oath that he was not guilty in this trial when he pleaded guilty in a criminal trial four years prior.

This judge used the testimony of two Commodity Credit Corporation investigators when he knew they had stolen the Sante Fe railroad records that would prove the grain was stolen between May 15,1965 and the fall

of 1965. He refused appellant access to these records. He knew there would be no claim for any money because the judgement was issued because of storage payments made on grain over a period of several years and they wanted the storage payments back. He knew the grain was not missing prior to May 13,1965. This judge participated in a conspiracy to embezzle approximately eight million dollars from the appellant. The appellant did not have the records at the time to appeal the case. The former employees had stolen the records and the appellant spent years attempting to find out what happened to eight million dollars. In June of 1980 the appellant represented himself in a case in Amarillo, Texas and the jury awarded him eight million dollars for embezzlement by eight of his former employees. He had discovered very important records three days before this trial.

The appellant filed a suit in Fort Worth Texas in Federal District Court as an independent action. The judge in this case allowed as new evidence the case that had been held in Amarillo, Texas. But, this judge never heard the different motions presented by the appellant. The appellant believes this judge did not give this case the time necessary to know what really happened. This case is a massive fraud and conspiracy envolving many people. The appellant has filed 35 "MEMORIALS" of impeachment against different federal officials that he alleges is envolved in the conspiracy. The first impeachment filed was against the U.S.Attorney for Kansas. He had been in office for seven years and resigned in a few weeks. It would take hundreds of pages to explain all the impeachments.

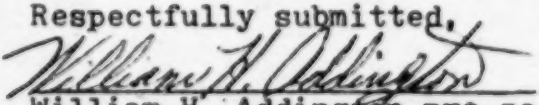
The Fifth Circuit Court of Appeals never

mentioned the most important issue in the case. The fact the appellant was denied a jury trial time after time. This is against all facets of our society. This cannot possibly be allowed to happen.

Conclusion

It must be evident to this Honorable Supreme Court of the United States that this is a very unusual case. The appellant is a victim of a massive conspiracy against him. He has been denied a jury trial. He has been denied records in the original trial. It must be obvious to this court there was Fraud upon the Court.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF KANSAS

FARMERS ELEVATOR MUTUAL
INSURANCE COMPANY, et al.,
Plaintiffs,
vs. CIVIL ACTION
No. T-4312
COMMODITY CREDIT CORPORATION,
ADDINGTON GRAIN., CO. INC., W.
H. ADDINGTON et al.,
Defendants.

JOURNAL ENTRY OF JUDGEMENT

Now on this 14th day of November, 1974, the Court after being advised in these premises finds that judgement should be entered on behalf of plaintiff against defendant, W. H. Addington personally, and against Addington Grain Co., Inc. for the amount of $303,038.00.

The court further finds that the Findings of Fact and Conclusion of Law filed herein on October 21, 1974, are incorporated herein by reference.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff have judgement against W. H. Addington, Jr., individually

and personally, and also against Addington Grain Co., Inc. in the Amount of $303,038.00 plus costs.

GEORGE TEMPLAR
JUDGE
SENIOR ASSIGNED

APPROVED BY:

FISHER, PATTERSON, SAYLER & SMITH
520 FIRST NATIONAL BANK TOWER
Topeka, Kansas 66603

By_____
Attorney for Plaintiff

_____
W.H. Addington

_____
for Addington Grain Co., Inc.

Entered in the Docket 11-14-74 .

Filed
Nov. 14, 1974
ARTHUR G. JOHNSON, Clerk

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF TEXAS FORT WORTH DIVISION

WILLIAM H. ADDINGTON, Plaintiff, VS FARMER'S ELEVATOR MUTUAL INSURANCE COMPANY, a Corporation Defendant.	CIVIL ACTION NO. 4-79-94K

ORDER

On the 8th day of October, 1980, came on to be heard the above-styled and numbered cause and came the parties, through their attorneys' and the Court having read the pleadings, briefs, and heard oral argument, is of the opinion that defendant's Motion for Summary Judgement should be GRANTED.

It is therefore ORDERED, ADJUDGED AND DECREED, that plaintiff take nothing by his suit and that such be, and it is, hereby DISMISSED.

IT IS SO ORDERED.

Signed this 27th day of October, 1980

DAVID O. BELEW, JR.

DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

ADDINGTON v. FARMER'S ELEVATOR MUT. INS. CO.

William H. Addington,
Plaintiff-Appellant,

v.

FARMER'S ELEVATOR MUTUAL INSURANCE COMPANY, A Corporation, Defendant-Appellee.

No. 80-2284
Summary Calender.

United States Court of Appeals
Fifth Circuit
Unit A

July 13, 1981

Suit was filed alleging that defendant insurer subjected plaintiff to harassment by prosecuting a subrogation claim against plaintiff that was allegedly discharged upon plaintiff's adjudication as a bankrupt, and by attempting to enforce the allegedly invalid money judgement granted defendant on the basis of subrogation claim. Plaintiff subsequently admitted that defendant's subrogation claim was not discharged in bankruptcy, and he thus waived his action alleging harassment on that basis. A motion of plaintiff for permission to amend his complaint to state another claim forming the basis for relief was denied by the United States District Court for the Northern District of Texas, at Fort Worth, David O.

Below, Jr., J., and plaintiff appealed from entry of summary judgment for defendant. The Court of Appeals, Tate, Circuit Judge, held that: (1) district court order granting defendant's motion for summary judgment and dismissing plaintiff's suit was so inconsistent with plaintiff's request for leave to amend to state a new claim for relief as implicitly to deny the motion to amend, and (2) district court did not abuse its discretion in failing to grant plaintiff's motion for leave to amend its complaint in an attempt to establish a new factual basis and legal theory for collateral attact on defendant's Kansas federal court judgment.

Affirmed.

1. Federal Civil Procedure---928

Denial of motion by district court, although not formally expressed, may be implied by entry of final judgment, which is in effect an overruling of pending pretrial motions, or by entry of an order inconsistent with granting of relief sought by the motion.

2. Federal Civil Procedure---849

District court order granting defendant's motion for summary judgment and dismissing plaintiff's suit was so inconsistent with plaintiff's request for leave

to amend to state a new claim for relief as implicitly to deny the motion to amend. Fed.Rules Civ.Proc. Rule 15(a) 28 U.S.C.A.

3. FEDERAL CIVIL PROCEDURE---833

While leave to amend pleadings "shall be freely given when justice so requires," it is by no means automatic. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

4. Federal Civil Procedure---828

Decision to grant or deny a motion for leave to amend lies within sound discretion of trial court. Fed. Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

5. Federal Civil Procedure---830

District court did not abuse its discretion in failing to grant plaintiff's motion for leave to amend complaint in attempt to establish a new factual basis and legal theory for collateral attact on defendant's Kansas federal court judgment, where motion for leave to amend came more than a year after plaintiff's institution of suit, after discovery had been terminated and after defendant's motion for summary judgment, where motion to amend, if granted, would in all likelihood have caused prejudice to defendant, where plaintiff did not attempt to justify his delay, and where the amendment

sought was futile. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

6. Federal Civil Procedure---828

In exercising its discretion on a motion for leave to amend, trial court may consider such factors as undue delay, bad faith or dilatory motive on part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party by virtue of allowance of amendment, and futility of amendment. Fed.Rules Civ.Proc. Rule 15 (a), 28 U.S.C.A.

7. Federal Civil Procedure---834

Trial court may examine whether undue prejudice to movant will result from denial of motion for leave to amend. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

8. Federal Civil Procedure---828

If complaint as amended would still be subject to dismissal, no abuse of discretion occurs when amendment is denied. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

9. Federal Civil Procedure---2641

An independent action to obtain relief from a prior judgment cannot be made a basis for relitigation of issues adjudicated by the judgment sought to be annulled.

1. The plaintiff incorrectly designated the defendant as "Farmer's Elevator Mutual Insurance Company."

Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

10. Federal Civil Procedure---839

Plaintiff's proposed amendment to his complaint did not establish a "fraud upon the court," since he alleged no scheme by which the integrity of the judicial process had been fraudulently subverted by a deliberately planned scheme in a manner involving "far more than an injury to a single litigant."

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, POLITZ and TATE, Circuit Judges.

TATE, Circuit Judge:

The plaintiff Addington, proceeding pro se in the district court and on appeal, seeks reversal of the district court's order granting the defendant's motion for summary judgment. The plaintiff filed a civil diversity action below, alleging that the defendant Farmland Mutual Insurance Company (Farmland)[1] subjected him to harassment by: (1) prosecuting a subrogation claim against Addington that was allegedly discharged upon Addington's adjudication as a bankrupt, and (2) attempting to enforce the allegedly invalid

money judgment granted to the defendant on the basis of the subrogation claim. On appeal, the plaintiff admits that the defendant's subrogation claim was not discharged in bankruptcy, and he therefore waives his action alleging harrassment on that basis. Rather, the plaintiff urges that the district court erred by refusing to allow him to amend his complaint to state another claim forming the basis for relief. We find no error below and affirm the summary judgment of dismisal.

The Facts

The plaintiff Addington formerly owned as sole stockholder the Addington Grain Company, Inc. (Addington Grain), a grain storage company. Sometime prior to 1965, the plaintiff issued a personal guaranty agreement. By it, he agreed to reimburse the Commodity Credit Corporation (Commodity) for any losses that it might suffer due to a shortage of its grain stored in the Addington Grain elevators.

In November of 1965, a shortage of Commodity grain was discovered at Addington Grain. Farmland (then Farmer's Elevator Mutual Insurance Company), as insurer for Commodity and pursuant to its blanket policy covering the obligation of the grain elevator/

warehouseman, paid Commodity in the amount of its losses resulting from the grain storage. Farmland was then subrogated to Commodity's right to recover losses from the plaintiff Addington.

On the basis of this subrogation claim, Farmland filed suit in federal district court in Kansas against Addington on August 7, 1967, to recover the outstanding amount paid to Commodity under the contract of insurance. On November 5, 1968, Addington filed bankruptcy and, on August 20, 1969, was discharged in bankruptcy. Aware that Addington had filed for bankruptcy and was adjudged bankrupt, Farmland continued to prosecute its separate suit against Addington, rather than to intervene in the bankruptcy proceedings.

On November 14, 1974, Farmland obtained in the federal district court a judgment against Addington for $303,038.00 plus costs (representing unrecovered amounts paid by it to Commodity due to grain shortage losses). Under the findings of fact and law in this suit, Addington had participated in causing the shortage, and the debt was not discharged by Addington's bankruptcy by virtue of Section 17(a)(2) of the former bankruptcy act (fraudulent acts). Addington did

not appeal this judgment. Thereafter, on two separate occasions subsequent to entrance of its judgment, Farmland caused Addington to return to Kansas (from his home in Fort Worth, Texas) for examination (as the judgment debtor) in aid of execution of the money judgment. There is no indication in the appellate record that the judgment has been satisfied to date.

On March 2, 1979, Addington filed the present diversity suit in federal district court in Texas, alleging that he was subject to harassment by Farmland, through its attempts to execute upon the Kansas federal judgment, allegedly invalid on the basis of Addington's discharge in bankruptcy. Addington sought to recover damages thereby caused to him. (The proposed amended complaint at issue attacks this judgment as fraudulently obtained.)

On April 2, 1980, the defendant filed a motion for summary judgment. The grounds for the motion were that the subrogation claim was not discharged by Addington's adjudication as a bankrupt and, moreover, that Addington could not now collaterally attack the Kansas federal district court judgment.

The plaintiff responded, on April 10, 1980, with

his own motion for summary judgment. Additionally, on April 11, 1980, the plaintiff filed a motion to amend his complaint to attack collaterally Farmland's Kansas federal district court judgment on the basis of fraud. In essence, the plaintiff contends in his proposed amended complaint that the defendant Farmland, the federal district judge presiding over the federal case in Kansas, and certain former employees of Addington Grain (one of whom, who had been convicted of embezzlement in connection with the missing grain, testified on Farmland's behalf in the prior case) conspired to have the federal district court judgment entered against him.

On October 9, 1980, the Texas federal district court held a hearing on the motions for summary judgment. On October 28, 1980, the district court granted the defendant's motion for summary judgment without express disposition of the plaintiff's motion to amend his complaint.

On appeal, the plaintiff abandoned any claim that the Kansas judgment was invalid on the basis that farmland's subrogation claim was discharged in bankruptcy. Thus, the plaintiff's success on appeal rests on the

validity of his attack directed to the Kansas judgment on the basis of fraud attempted to be asserted by the proposed amended complaint.

Ruling on the Motion to Amend?

At the hearing on the motions for summary judgment, the district court judge questioned Addington as to the facts forming the basis for his allegations of fraud as set forth in his proposed amended complaint. However, in presenting Farmland's case, counsel pointed out that, since the court had not granted the motion to amend, the issue of fraud was not before the court at the hearing on the motions for summary judgment. Counsel for Farmland argued its motion on the basis of Addingtons allegations that the judgment was invalid due to his discharge in bankruptcy, but he also pointed out that the Kansas judgment was not subject to collateral attack in this Texas proceeding, as was scught by the proposed amended complaint. The district judge made no comment with regard to what it considered to be the posture at the time of hearing of Addington's amendment-asserted fraud claim.

Following hearing, the district court issued an order, stated to have been based on the pleadings,

briefs, and oral argument. By it, the court granted the defendant's motion for summary judgment and dismissed the plaintiff's suit. No mention was made of the intended disposition of the plaintiff's motion to amend his complaint.

In order to determine the proper disposition of the plaintiff's appeal--which rests solely on the merits of the fraud in the Kansas federal district court suit which was first asserted by the proposed amended complaint--we must initially determine whether the district court's final order can be considered an implied denial of the motion to amend or whether, instead, the case must either be remanded for a ruling on his motion or else the summary judgment be set aside as (on the basis of the amendment) improvidently granted.

Implied Denial of the Motion to Amend

(1) The denial of a motion by the district court, although not formally expressed, may be implied by the entry of final judgment (which is in effect an overruling of pending pretrial motions) or of an order inconsistent with the granting of the relief sought by the motion. Agostino v. Ellamar Packing Co., 191 F.2d 576, 577 (9th Cir. 1951); Mosier v.Federal Reserve

Bank of New York, 132 F.2d 710, 712 (2d Cir. 1942); see also Cohen v. Curtis Publishing Co., 333 F.2d 974, 977 (8th Cir.), cert. denied 380 U.S. 921, 85 S.Ct. 923, 13 L.Ed.2d 808 (1965). Other decisions have recognized that this principle may be applicable, although not finding in the particular instance that the denial was so implied.[2]

(2) We find that the district court's order of October 27, 1980, granting the defendant's motion for summary judgment and dismissing the plaintiff's suit, was so inconsistent with the plaintiff's request for leave to amend to state a new claim for relief as implicitly to deny the motion to amend. The district court itself noted at the hearing on the motion for summary judgment that the new grounds asserted by the proposed amended complaint constituted a collateral attack upon a judgment valid on its face, R.II at p. 23, and counsel for the defendent strongly argued the impropriety of that attack as barred by collateral estoppel and lack of recognized ground for collateral attack in another court than that which entered judgment, R.II at pp. 26-29.[3]

In light of our determination that the district

court denied--by necessary implication--the plaintiff's motion to amend, we now direct our review to a determination of whether, as the plaintiff contends, the district court erred in so doing.

Review of Denial of the Motion to Amend

(3-5) Leave to amend pleadings "shall be freely given when justice so requires," Fed.R.Civ.Proc. Rule 15 (a). However, it is by no means automatic, Layfield v. Bill Heard Chevrolet Company, 607 F.2d 1097, 1099 (5th Cir. 1979), cert, denied 446 U.S. 939, 100 S.Ct. 2161, 64 L.Ed.2d 793 (1980). Thus, the decision to grant or to deny a motion for leave to amend lies within the sound discretion of the trial court. Layfield, supra. Here, we find no abuse of discretion in the district court's failure to grant the plaintiff's motion for leave to amend.

(6-8) In exercising its discretion, the trial court may consider such factors as "undue delay, bad faith or dilatory motive on the part of the movant, repeated fail-

2. See United States v. Pan American World Airways, Inc., 299 F.2d 74, 76 (5th Cir. 1962), rev'd. on other grounds 382 U.S. 25, 86S.Ct. 153, 15 L.Ed. 2d 21 (1965); Wimberly v. Clark Controller Company, 364 F.2d 225, 227 (6th Cir. 1966).

ure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, (and) futility of the amendment." Gregory v. Mitchell, 634 F.2d 199, 203 (5th Cir. 1981), quoting from Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Thus, the trial court may examine whether undue prejudice to the movant will result from denial of the motion. Pan-Islamic Corporation v. Exxon Corporation, 632 F.2d 539, 546 (5th Cir. 1980). Clearly, if the complaint as amended would still be subject to dismissal, no abuse of discretion occurs when amendment is denied. Id.

In his motion for leave to amend, the plaintiff attempted to establish a new factual basis and legal theory for his collateral attack on Farmland's Kansas federal court judgment. Coming as it did more than a year after Addington's institution of suit, after discovery had been terminated and after the defendant's

3. The district court also granted the plaintiff's motion to adduce evidence of his former employees' conspiracy to embezzle money from the Addington Grain company accounts. The additional evidence in no way implicates Farmland or the federal district court judge in the embezzlement scheme.

motion for summary judgment (argued on the basis of the discharge in bankruptcy theory), the motion to amend, if granted, would in all likelihood have caused prejudice to the defendant. Nor did the plaintiff attempt to justify his delay of more than a year in proposing the amended complaint.[4]

Moreover, the amendment sought was futile. The plaintiff was not prejudiced by the denial of the motion because the plaintiff could not have defeated the defendant's motion for summary judgment on the basis of the amended complaint if allowed. The amended complaint would have essentially alleged that Farmland conspired with the presiding federal judge, the insured Commodity, certain Addington Grain employees, and certain grain elevator inspectors, among others to cause Addington to bear the burden created by the grain shortage in the Add-

4. At the 1980 hearing on the motions for summary judgment, the plaintiff stated that he had just recently found evidence of his former employees' attempts to embezzle money from Addington Grain prior to 1965. However, according to his hearing testimony, the plaintiff was aware at the time of the previous (Kansas) federal trial (1) that the trial judge was prejudiced against him and (2) that his former employee who testified on behalf of Farmland was then (allegedly) committing perjury.

ington Grain elevators. The allegations of the amended complaint do not suggest that Farmland itself participated in producing the shortage of grain.[5] Farmland's participation in the alleged conspiracy is that it filed the suit to recover against Addington on his personal guaranty of any shortage, knowing that the shortage in 1965 was due to embezzlement and that Commodity (Farmland's insured) was a member of the conspiracy--a conspiracy that Addington allegedly could have proved if he had not been denied some Santa Fe Railroad records (denied by the Santa Fe railroad and the failure of discovery efforts by him on his behalf). Farmland is charged with joining in the fraud by using the same perjured testimony (that had previously been accepted as credible in the previous state and federal proceedings definitively decided adversely to Addington), and by knowing that Add-

5. Addington apparently attributes the shortage to the actions, unknown to him, of his employees. There is no allegation that Commodity participated in the shortage to get the insurance money and that Farmland knowing this, paid the amount due under the contract of insurance in the hope of recovering the amount paid from Addington on the basis of his personal guaranty to Commodity. He does attempt to impute conspiratorial motives in the thwarting of his discovery efforts in the Kansas proceedings, although it is not clear how Commodity or Farmland could have prevented him from obtaining certain records in the possession of others.

ington had moved to recuse the Kansas federal judge as biased.

(9) The proposed amendment was, in effect, an attempt by Addington to assert an independent action for relief from the Kansas federal district court judgment on the basis of fraud or of a "fraud on the court"[6]. In Bankers Mortgage Company v. United States, 423 F.2d 73 (5th Cir. 1970), cert. denied 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed2d 793 (1970), this circuit set forth essential elements of an independent action to obtain relief from a prior judgment:

> (1) a judgment which ought not, in equity and good conscience, to be enforced: (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any adequate remedy at law.

6. Federal Rule of Civil Procedure Rule 60(b) recognizes that a court may entertain an independent action to relieve a party from a judgment, or to set aside a judgment for fraud upon the court.

Id. at 79, quoting from National Surety Company v. State Bank, 120 F. 593, 599 (8th Cir. 1903). As stated in Bankers Mortgage, "The independent action cannot be made a basis for the relitigation of issues" adjudicated by the judgment now sought to be annulled. 423 F2d at 79.

We do not find that Addington's proposed amended allegations satisfy the requirements essential to an independent action to obtain relief from a prior judgemnt on the ground that it was fraudulently obtained. Addington's charge of bias on the part of the federal judge could have been remedied on appeal. The allegation that Farmland used perjured testimony in support of its case is an attempt to relitigate the credibility of the witnesses whose testimony was accepted (against a similar attack as now made) in the proceeding that resulted in the prior judgment. Finally, whether or not Addington was responsible for the Commodity grain shortage, he was ultimately responsible to Commodity for all losses suffered on the basis of his personal guaranty, although he would have been discharged in bankruptcy if his conduct had not been found to be fraudulently intentional collaboration with the

witness (convicted of the embezzlement) whom he asserts now, as he did in the earlier trial, gave perjured testimony in implicating Addington.[7] Since it is not alleged that Farmland participated in the employees' alleged conspiracy to steal grain or otherwise embezzle from Addington Grain, Farmland's knowledge that the loss caused Commodity resulted from an illegal conspiracy on the part of Addington Grain employees is insufficient to characterize the suit for recovery of those losses as itself fraudulent.

In sum, the plaintiff has alleged no facts indicating that the issues raised were not open to litigation in the former action or that he was denied a fair opportunity to make his claim or defense in that action. His independent action for relief on the ground of fraud therefore fails. Bankers Mortgage Company v. United States, supra, 423 F2d at 79.

(10) Nor does Addington's proposed amendment establish a "fraud upon the court"; he has alleged no scheme by which the integrity of the judicial process has been fraudulently subverted by a deliberately planned scheme in a manner involving "far more than an injury to a single litigant." Hazel-Atlas Glass Company v. Hartford-Empire Company, 322 U.S. 238, 245-246, 64

S.Ct. 997, 1002, 88 L.Ed. 1250 (1944). See also 7 Moore's Federal Practice 60.33 (1979); 11 Wright and Miller, Federal Practice and Procedure 2870 (1973).

Conclusion

We find that: (1) the district court implicitly denied the plaintiff's motion for leave to amend his complaint, and (2) the district court did not abuse its discretion by denying the plaintiff's motion. Since the plaintiff abandoned on appeal the issue of the discharge in bankruptcy of Farmland's subrogation claim, the district court's granting of the defendant's motion for summary judgment is AFFIRMED.

7. The present proceedings show that Addington himself was indicted, but that he was acquitted of criminal charges.

No.

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. ADDINGTON,

Appellant

v.

FARMER'S ELEVATOR MUTUAL INSURANCE COMPANY, A Corporation,

Appellee

Certificate of Service

I hereby certify that on this 8th day of October, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to James B. Harris, of Thompson & Knight, 2300 Republic National Bank Building, Dallas, Texas 75201.

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